

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

**DATE:** July 17, 1996

**TO:** Michael Dunn, Regional Director, Region 16

**FROM:** Barry J. Kearney, Associate General Counsel, Division of Advice

**SUBJECT:** Raines Electric Company, Case 16-CA-17572

506-2001-5000, 524-5073-2200, 524-6713-6700, 524-6715-2000

This matter was submitted for advice whether the Employer unlawfully discharged an employee who left work to join a union's area standards picket line directed against his non-union employer and then remained out "on strike" for two additional days after the union removed the picket line.

**FACTS**

Raines Electric Company ("Raines" or "the Employer") is the electrical installation and service subcontractor at the Walmart Super Center in Beaumont, Texas.

Royce L. Robbins, journeyman electrician, is a member of IBEW Local Union No. 479 ("Local 479" or "the Union"). On July 24, 1995 Robbins was hired by Raines to the position of licensed electrician. This allowed the Employer to meet the city's requirement of having one licensed electrician working with unlicensed electricians.

On July 31, the Employer held a meeting with its employees to inform them that Local 479 was planning to put up a picket line. The Employer told the employees not to make any trouble and just drive through the line.

On August 8, Robbins gave his supervisor, Brockett, a letter from the Union which identified Robbins as a union organizer. According to Robbins, later that day Brockett told him he was doing a good job. Robbins then asked Brockett for a raise. This led to a discussion about the Employer's policy on raises, but no offer of a raise. [\(1\)](#) Later that day Robbins was assigned to work by himself. Prior to this he worked with a helper.

Robbins claims that, on August 10, Brockett again told him he was doing a good job. Brockett denies this. According to Brockett, on this day Robbins' production had slowed down because he was away from his work station all day conversing with employees. Brockett further claims to have mentioned this to the Employer's President, Raines, when Raines visited the jobsite that day.

On August 11, Local 479 established a picket line at the construction site to protest substandard wages that the Employer was paying employees on this project. Robbins and another Raines employee, Parker, picketed along with other Union officers and members. Both Raines and Brockett were aware that Parker and Robbins were on the picket line.

Approximately two hours after the work day began, Kibbe, a Union organizer, told Parker and Robbins to return to work. According to Robbins, Kibbe told him to ask for a raise and to return to the picket line if the Employer refused. Parker says that Kibbe did not tell him this, but may have said it to Robbins. Kibbe stated that Robbins, Parker, and Local 479's officials discussed the situation and determined that Robbins and Parker should offer to return to work, but still ask for a raise, and see what happened. Kibbe did not recall giving Robbins any specific instructions to return to the picket line if their request was denied.

Upon entering the facility Parker and Robbins saw Brockett, Raines, and Dean, a foreman. According to Robbins, Brockett

asked them what they were doing and said they were late for work. Robbins said he wanted more money. Raines told Robbins he did not deserve any more money because he had heard Robbins was slowing down production. Robbins disputed this and said he would remain on strike unless they gave him a raise. Robbins then returned to the picket line and Parker went to work.

Brockett asserts that when Parker and Robbins walked into the building he told them they were late for work. Robbins said they were picketing and told Raines they needed a raise. Raines told Robbins he was considering cutting his pay because his production had gone down. Robbins said if he did not get a raise he would just go back on strike. Parker did not say anything. Robbins left the building. Brockett asked Parker if he was ready to return to work; Parker said yes and went to work.

According to Raines, when Parker and Robbins entered the premises he asked them how they were doing. Robbins said they were ready to work and Raines said they should. Parker said he was going to work and walked off. Robbins asked for a raise. Raines told Robbins that he had been told Robbins had been working at a much reduced rate and a raise was out of the question under the circumstances. Robbins said that was just fine, he had done a day's work for a day's pay, and asked Raines what he intended to do about a license. Raines told Robbins to let him worry about the license. Raines denied that Robbins said if he could not get a raise he was going back out on strike. Rather, Robbins simply left the premises.

According to Parker, Brockett asked them if they were ready to return to work and he said sure. Robbins said he would like to discuss wages. Someone said something about working harder or not working hard enough. Parker then started walking towards his work area and Robbins turned as if to go back outside. Raines said something about Robbins having slowed down and Robbins said something about going back outside. Parker heard nothing further.

Robbins returned to the picket line and picketed with Kibbe until around noon. On Saturday and Sunday, August 12 and 13, Robbins remained on strike and did not report to work, although the crew worked. No one picketed on these days.

On August 14, Robbins attempted to return to work. According to Robbins, Brockett told him he was terminated and he would receive the reason in the mail. Robbins continued to ask why he was terminated and finally Brockett said because he was off for three days and did not call in. Robbins attempted to explain that he was on strike. Brockett again said he would receive the reason in the mail.

Brockett claims that, on August 13, he decided that he would terminate Robbins when he returned to work if Robbins did not explain his absence. When Robbins returned on August 14, Brockett asked him three times where he had been and Robbins did not respond. Brockett told Robbins to leave the project because he needed a man who would show up. Robbins picked up his tools and left. Brockett said that he did not inform Raines of his decision to terminate Robbins or that he had terminated Robbins until some days later when he returned to headquarters in Dallas.

On about August 15, Robbins received a termination letter from Raines which states: "...You have engaged in "solicitation" during working hours; you have engaged in a "work slow-down" effort; and you refused to work and walked off the job Friday, August 11, and have not returned....."

Raines said that on Friday, August 11, he decided to terminate Robbins because Robbins had the license Raines needed to meet the city requirement and Robbins had walked off the job, and because Brockett had told Raines on August 8 and 10 that the time Robbins spent soliciting during working hours had caused a reduction in Robbins' production. He stated that he had asked several employees if this was true and they told him yes. He also questioned employees about Robbins in accordance with Company policy to try and determine why he walked off the job.

Raines further said that "The company has adopted a no solicitation rule which prohibits soliciting by non-employees for any reasons, and prohibiting employees from soliciting each other (sic) from any reason, during work hours." The Employer, however, stated that the rule is not enforced so long as the employee is not abusive. The first time the rule was enforced was with Robbins.

Robbins admitted that he spoke with the employees. However he said the conversations occurred while the employees were on breaks, in passing, or while taking an unscheduled break to go to the water fountain. The investigation established that Robbins also stopped work to discuss unionization. Robbins acknowledged that his production had slowed down after August 8, but he

said this was due to the fact that he was required to work alone and the new assignment involved running conduit through concrete walls which required him to stop and drill and which took a longer period of time. He sometimes hit rebar and had to move to a new location and start over. Further, he had to work on the doors which required him to move around the building with extension cords. In addition, contrary to Brockett, Robbins said that on the last day he worked, August 10, he mounted five junction boxes and ran 140 feet of conduit. Robbins also stated that prior to August 8, 1995 he had the assistance of a helper and he worked in conjunction with other employees installing pipes, which was less time consuming.

### ACTION

We conclude that the Employer violated Section 8(a)(1) and (3) by discharging Robbins for engaging in protected activity by "walk[ing] off the job Friday, August 11," and that the Employer has not met its Wright Line<sup>(2)</sup> burden of showing that Robbins would have been discharged in any event for lawful reasons.

It is well settled that engaging in union activities, including joining a lawful union picket line, is protected activity. Likewise, it is settled that individual activity, when engaged in to assist a union in pursuit of its legitimate goals, is both protected and concerted. As the Supreme Court noted in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 115 LRRM 3193, 3197 (1984):

Although one could interpret the phrase, "to engage in concerted activities," to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of §7 does not confine itself to such a narrow meaning. In fact, §7 itself defines both joining and assisting labor organizations -- activities in which a single employee can engage -- as concerted activities. (Emphasis added.)

In the instant case, Robbins left work on August 11, in full view of Raines and Brockett, to rejoin the union's picket line, and remained on that line until it was taken down later that afternoon. Further, it is apparent on the face of the discharge notice that this activity was among the reasons for which Robbins was discharged. In these circumstances, there is a prima facie case that Robbins' discharge was unlawful, even though he was the only Raines employee who rejoined the picket line following the conversation that occurred that day with Raines, Brockett, Dean and employee Parker.<sup>(3)</sup>

Further, the employer has not established "by a preponderance of the evidence that [Robbins] would have been fired even if he had not been involved with the Union."<sup>(4)</sup> The employer's discharge notice advances three reasons for Robbins' termination:

"...You have engaged in "solicitation" during working hours; you have engaged in a "work slow-down" effort; and you refused to work and walked off the job Friday, August 11, and have not returned....."

The first two reasons may be dismissed summarily. The facts show that, before rejoining the Union's picket line on the afternoon of August 11, Robbins was invited by Company President Raines and supervisor Brockett to return to work. This occurred after the alleged incidents of "solicitation" or "work slowdown." It is thus apparent that the Employer did not consider either of these reasons, standing alone or together, to be sufficient grounds to discharge Robbins.

Whether Robbins' conduct after he walked out on Friday would have constituted an independent basis for discharging him is less clear. Thus, after the Union removed its picket line on August 11, Robbins remained "on strike" for two additional days. And from the facts adduced in the investigation, it is not perfectly clear whether this was in furtherance of the Union's protest of Raines' wage structure, or whether it was in furtherance of a purely personal gripe by Robbins about his own failure to receive a wage increase.

One basis for proceeding is that, crediting Robbins, his failure to work on August 12 and 13 was because he was "on strike," arguably in furtherance of the Union's objective as well as his own. More tellingly, however, is that even if the "strike" on the 12th and 13th were purely in support of Robbins' personal gripe, discharging him for a two-day absence is not consistent with the Employer's policy. The investigation indicates that the Employer's policy is to discharge an employee for a three-day unexcused absence, and on the first of the three days Robbins was out, he was clearly engaged in protected concerted activity. Thus, because the discharge for being absent on the 12th and 13th is so inextricably bound up with the absence on the 11th,

and because the absence on the 11th was clearly protected, the Employer cannot rely on its third reason ("walk[ing] off the job") to support a Wright Line defense.<sup>(5)</sup>

For these reasons, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by discharging Robbins.

B.J.K.

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<sup>1</sup> Brockett admitted telling Robbins he was a doing a good job, but he denied the conversation about the raise.

<sup>2</sup> Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 899, 108 LRRM 2513 (1st Cir. 1981), cert. denied 455 U.S. 989, 109 LRRM 2779 (1982).

<sup>3</sup> Because Robbins' activity on August 11 was in furtherance of Local 479's lawful picketing of Raines, this case is unlike situations in which an individual employee, outside the context of union activity, pursues a purely personal gripe against his employer. See, e.g., Capital Ornamental Concrete Specialties, Inc., 248 NLRB 851 (1980), cited in NLRB v. City Disposal Systems, Inc., 115 LRRM at 3198, n. 10. Rather, this case is more closely analogous to situations in which an individual employee makes common cause with a union that does not represent that employee. See, e.g., General Tire & Rubber, 190 NLRB 227, 229-230 (1971), enf'd. 451 F.2d 257 (1st Cir. 1971) (Refusal of individual non-unit employee to cross picket line set up by union representing other employees of same employer); cf. Washington State Service Employees State Council No. 18 (Jill Severn), 188 NLRB 957 (1971) (Individual terminated for "participating in a demonstration with employees of other employers . . .").

<sup>4</sup> NLRB v. Transportation Management Corp., 462 U.S. 393, 113 LRRM 2857, 2858 (1983) (characterizing an employer's burden under the Board's decision in Wright Line).

<sup>5</sup> See NLRB v. Transportation Management Corp., supra, 113 LRRM at 2861 ("It is fair that [the Employer] bear the risk that the influence of legal and illegal motives cannot be separated . . .").